IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 28-7-2006

Coram

The Honourable Mr.Justice N.PAUL VASANTHAKUMAR

Writ Petition No.5726 of 1998

The Management,
Gedee Weiler Pvt. Ltd.,
Gopal Bagh,
1062 Avanashi road,
Coimbatore - 641 018 ... Petitioner

Vs.

1. P. Swaminathan

2. The Presiding Officer,
Labour Court,
Coimbatore. ... Respondents

This writ petition has been filed under Article 226 of Constitution of India, praying this Court to issue a writ of Certiorari, to call for the records connected with order dated 27.2.1998 made by the Presiding Officer, Labour Court, Coimbatore in Complaint No.1/97 and quash the same.

For Petitioner : Mr.Sanjay Mohan for M/s.Ramasubramaniam & Associates

For 1st Respondent : Mr.K.V.Shanmuganathan

2nd Respondent : Court

O R D E R

Petitioner seeks to quash the order made in Complaint No.1 of 1997 dated 27.2.1998 on the file of the Labour Court, Coimbatore, the second respondent herein.

2. Brief facts necessary for disposal of the writ petition are as follows.

(a) Petitioner is engaged in the manufacture of High Precision Capstan Lathes, Tool Room Lathes and Automats. Petitioner has got branches all over the South India. The petitioner Management used to

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transfer/depute personnel from its manufacturing Unit, who knows servicing, to all the branches for a specific period depending upon the exigency of work.

(b) Petitioner Management received a letter on 23.6.1997 from the Senior Sales Officer, Chennai branch, requesting to depute a person to attend the complaint/service of Gedee Weiler Lathes. Pursuant to the said letter, the first respondent was transferred to Chennai branch Office by order dated 5.7.1997. The first respondent failed to comply with the said order and did not report for duty at Chennai branch. Therefore, petitioner management initiated disciplinary action against the first respondent.

(c) I.D.No.140 of 1997 was pending on the file of the second respondent due to the reference dated 12.3.1997 with regard to a specific issue as to whether the transfer of six individuals was justified or not. No general issue with regard to the very power of the Management to transfer the individuals was referred to be decided in the said industrial dispute. The petitioner Management is the first respondent in the said I.D.No.140 of 1997.

(d) The first respondent alleged that the petitioner Management contravened the provisions of section 33 of the Industrial Disputes Act, 1947 in issuing the order of transfer to him while I.D.No.140 of 1997 was pending. In the said proceeding it is alleged that the petitioner Management had no power to transfer the first respondent and also alleged that the Model Standing Orders did not provide for any transfer and therefore the Company has no power to transfer the first respondent from one Unit to another or from one unit to the Madras Branch Office.

(e) The Management filed counter affidavit before the Labour Court and contended that the complaint itself was wholly without jurisdiction and there is no change in the service condition so as to attract Section 33 of the Industrial Disputes Act, 1947, and therefore the complaint is not maintainable because the first respondent was neither concerned nor connected with the dispute that was pending before the Labour Court in I.DNo.140 of 1997.

(f) Petitioner Management also contended that it has got power to transfer and in fact transfers were made in the past and the first respondent himself had been sent on deputation to sister concerns and he was also transferred from Unit-I to Unit-II and from Unit-II to Unit-I on earlier occasions. The second respondent without going into the maintainability of the complaint has gone into the matter on merits and directed the management to cancel the transfer order dated 5.7.1997 and to post the first respondent at Coimbatore itself and directed the Management to reinstate the first respondent with backwages for the period of non-employment. The said order is challenged in this writ petition.

3. The learned counsel for the petitioner submitted that the complaint itself is not maintainable because I.D.No.140 of 1997 is with regard to a reference which dealt only with the question of

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individual transfers issued to six workmen. As per G.O.Ms.No.204 dated 12.3.1997 there is no issue with regard to the alteration of conditions of service. The learned counsel therefore submitted that to maintain a complaint under section 33 of the Industrial Disputes Act, 1947, there should be a change in the conditions of service of the workman and the said condition having not been satisfied in this case, the second respondent has no jurisdiction to entertain the complaint under section 33 of the Industrial Disputes Act. The learned counsel also submitted that the Model Standing Order 33(2)(b) contemplates not only express powers of right but also implied powers as well and the Management exercised the implied powers and transferred the first respondent, which the Management did earlier also by transferring the first respondent on several occasions i.e., on 5.5.1994, 12.8.1994, 7.7.1995, 3.9.1995, etc., and the first respondent also accepted the said transfers without any demur. According to the learned counsel, some of the transfer orders were passed at the request of the first respondent himself and therefore the power to issue transfer order is available to the petitioner Management and the second respondent erroneously passed the order cancelling the same. The learned counsel contended that once there is power to transfer, then the petition under section 33A concerning such transfer would not lie at all. The learned counsel also cited the decision of the Full Bench reported in 1998 (4) LLN 804 (Correspondent, Malankara Syrian Catholic School, Marthandam v. J.Rabinson Jacob and others) and stated that the power of transfer may be express or implied and the implied power can be reasonably inferred to be included directly in the power of appointment and suo-motu recorded as an ancillary power.

4. The learned counsel for the first respondent submitted that the first respondent has been victimised and the management has no power to issue transfer orders and justified the order of the second respondent and prayed for dismissal of the writ petition.

5. I have considered the rival submissions of the learned counsel appearing on either side.

6. The point in issue is whether the Labour Court is justified in directing the petitioner Management to cancel the transfer order dated 5.7.1997 by giving a finding that the petitioner Management is not entitled to transfer the first respondent, which order is passed in the complaint made under section 33A of the ID Act.

7. To attract Section 33-A, there must be a pending adjudication during which time the conditions of service should have been altered. First of all it has to be decided as to whether by the order of transfer the first respondent's conditions of service has been altered or not. It is well settled in law that transfer is an incident of service and the power of transfer may be exercised by the

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management either expressly or impliedly. The very fact that the first respondent himself was transferred several times and the same have been accepted by the first respondent without any demur clearly shows that the first respondent admitted the implied power of the Management to transfer, though not the same is stated expressly. It is not the case of the first respondent that by virtue of the transfer his status is affected or his emoluments are reduced. Unless there is reduction in the status or emoluments there is no alteration of conditions of service.

8. The power of transfer vested with the management is considered by this Court and the Honourable Supreme Court in very many decisions.

(a) In W.P.No.14291 of 1992 (The Workmen rep. by the Secretary, Addisons Paints and Chemicals Ltd., Madras v. The Management of Addisons Paints and Chemicals Ltd, Madras and another) by order dated 23.4.1993, Justice M.Srinivasan (as he then was) held as follows,

> "I agree with the learned Judge and hold that the absence of a provision in the Standing Orders does not disentitle the management to pass an order of transfer, particularly when in the contract of service, the employee has undertaken to serve the company in any capacity as may be decided by the company. It is only when the terms of the contract of service are inconsistent with or contrary to the provisions of the Standing Orders, the same is unenforceable. When there is no provision in the Standing Orders with reference to a particular term in the contract of service, the latter can be enforced."

(b) In the decisions reported in 2004 (3) LLJ 749 (State of U.P. v. Gobardhan Lal), the Honourable Supreme Court in paragraph 7 held as follows,

> "7. It is too late in the day for any Government servant to contend that once appointed or posted in a particular place or position, he should continue in such place, or position as long as he desires. Transfer of an employee is not only an incident inherent in the terms of appointment but also implicit as an essential condition of service in the absence of any specific indication to the contra, in the law governing or conditions of service. Unless the order of transfer is shown to be an outcome of a mala fide exercise of power or violative of any statutory provision (an Act or Rule) or passed by an authority not competent to do so, an order of transfer cannot lightly be interfered with as a matter of course or routine for any or every type

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of grievance sought to be made. Even administrative guidelines for regulating transfers or containing transfer policies at best may afford an opportunity to the officer or servant concerned to approach their higher authorities for redress but cannot have the consequence of depriving or denying the competent authority to transfer a particular officer/servant to any place in public interest and as is found necessitated by exigencies of service as long as the official status is not affected adversely and there is no infraction of any career prospects such as seniority, scale of pay and secured emoluments. This Court has often reiterated that the order of transfer made even in transgression of administrative guidelines cannot also be interfered with, as they do not confer any legally enforceable rights, unless, as noticed supra, shown to be vitiated by mala fides or is made in violation of any statutory provision."

(c) A Full Bench of this Court in the decision reported in 1998 (4) LLN 804 (Correspondent M.S.C. School v. J.Rabinson Jacob) at paragraph 26 held as follows,

"26. From the resume of the observations made above it can be safely concluded that transfer is not necessarily included in the conditions of service as a term of the conditions of service. Transfer is a specie of appointment and being one of the modes of appointment, cannot be included in the appointment itself unless it is expressly or impliedly provided for. Thus the assumption that the power to transfer is included in the power of appointment is unsustainable. Power to transfer involving the cessation of appointment would depend upon the nature of the transaction involved. May be in peculiar facts where it does not bring about any alterations of the conditions of service, change of master, change of place, alteration in the terms of appointment, usage prevalent in the statutory provisions, rules and regulations and structure, duration of employment and various other circumstances may provide for a lead that it is an incident of service. The question whether it is an incident of service has to be determined in the facts and circumstances of each and every case is a question of facts."

9. Applying the above settled principle to the case on hand, the learned counsel for the petitioner pointed out that there is no

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finding given by the second respondent as to how the first respondent's conditions of service is changed. The second respondent held that there is no inherent right to transfer the workman. However, the second respondent failed to consider the implied power of transfer available to the management, which the management exercised several times and the first respondent also accepted the same without any demur. In fact, in the evidence, WW-1 stated that 11 persons were transferred and therefore it can be presumed that there is no victimisation against the first respondent. By virtue of transfer the conditions of service of the first respondent is not affected and that is not the case of the first respondent, i.e, either reduction in salary or reduction in rank.

10. The Labour Court having not given a finding as to how the first respondent's conditions of service is affected due to the transfer, the petition filed under section 33-A of the ID Act is not maintainable and section 33A itself is not attracted. That being the position, there is no contravention of section 33(1)(a). The finding given by the Labour Court that the transfer of the first respondent is bad due to non-availability of inherent right to transfer the first respondent herein, should be treated as perverse finding because the first respondent got implied power which the Management exercised against the first respondent. Hence the findings of the Labour Court is not justified and the impugned order passed on Complaint No.1 of 1997 is liable to be set aside and accordingly set aside.

The writ petition is allowed as above. No costs.

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Sd/
Asst.Registrar

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Sub Asst.Registrar

To

The Presiding Officer, Labour Court, Coimbatore.

1 CC TO MR.S. RAMASUBRAMANIAM & ASSOCIATES SR NO 33863

Order in
W.P.No.5726 of 1998

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